

2004

The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation

Beverly Balos

University of Minnesota Law School, balos001@umn.edu

Follow this and additional works at: https://scholarship.law.umn.edu/faculty_articles



Part of the [Law Commons](#)

Recommended Citation

Beverly Balos, *The Wrong Way to Equality: Privileging Consent in the Trafficking of Women for Sexual Exploitation*, 27 HARV. WOMEN'S L.J. 137 (2004), available at https://scholarship.law.umn.edu/faculty_articles/127.

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in the Faculty Scholarship collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

THE WRONG WAY TO EQUALITY: PRIVILEGING CONSENT IN THE TRAFFICKING OF WOMEN FOR SEXUAL EXPLOITATION

BEVERLY BALOS*

I. INTRODUCTION

Chamoli lived near the birthplace of the Buddha in Nepal. When she was 16, she met a young man and fell in love with him. He promised to marry her but insisted that she come away with him to India. So one day she ran away with the boyfriend and crossed the border to India on foot. From there she and her boyfriend took a train to the Indian city of Poona. Once they had reached Poona, Chamoli was taken to a house where there was an older Nepali lady and many young girls. The lady gave her boyfriend some money and then he told her that he was going for a moment. He never came back. Chamoli suddenly realized that she had been sold into prostitution. She refused to accept her new trade. She was repeatedly beaten. She was not given any food. When she screamed in defiance, knives and chilli powder were held to her genital area. Finally exhausted and worn down, she agreed to provide sexual services. After a few weeks, she was sold to a larger brothel in Bombay. There she was given a cubicle that consisted of one small wooden bed surrounded by a curtain. She lived and worked from this space. She served about 10 clients every night of the week Often the police raided the place but she was hidden below floorboards. Once she hid behind a curtain and watched as the police began their raid. The Madame of the house took out some money and paid the police and they immediately went away. Finally, the police raided the brothel with some Nepalese NGO activists and Chamoli was rescued. Chamoli was taken to a government home near Bombay. She was kept in a large room with 40 other women. The sanitary conditions and the food were worse than in the brothel. She did absolutely nothing for seven

* Clinical Professor of Law, University of Minnesota Law School. I am grateful for the comments and suggestions of Jane Aiken, Mary Louise Fellows, Sally Kenney, and David Weissbrodt. I also wish to thank Mary Rumsey of the University of Minnesota Law Library for her help and the University of Minnesota Law School for its support.

months and was kept in confinement within the home "for her own protection." . . . After seven months she was flown to Nepal by an NGO She was . . . reunited . . . with her family. By that time she began to have dizzy spells, diarrhoea and constant vomiting. The doctors of the NGO diagnosed her as having AIDS [S]he was . . . very ill She was 18 years old.¹

Global trafficking² of women as commodities for sexual exploitation is a multi-billion-dollar industry.³ A 1998 study by the Geneva-based International Labour Organization ("ILO") documents the commercial sex industry as deeply embedded in the economies of the Southeast Asian countries it studied, such as Indonesia, Malaysia, the Philippines, and Thailand.⁴ However, the nature of trafficking makes it difficult to obtain accurate figures on the extent of the problem. "According to a U.S. Government estimate based on 1997 data, 700,000 persons, mainly women and children, are trafficked across national borders worldwide each year. Other global estimates of the number of victims trafficked annually range from approximately one to four million."⁵ Every year, approximately 50,000 women and children are trafficked for sexual exploitation into the United States alone.⁶

Given the overwhelming numbers of women and children being trafficked for prostitution, it is important to remember the reality and nature of prostitution. Sexual abuse, physical violence, and homelessness are common

¹ *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, Hum. Rts. Comm., 57th Sess., Provisional Agenda Item 12(a), addendum ¶ 12, U.N. Doc. E/CN.4/2001/73/Add.2 (2001) [hereinafter 2001 *Report of Special Rapporteur*], available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cb26594f04a53a4c1256a1b0055e5df/\\$FILE/G0110865.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cb26594f04a53a4c1256a1b0055e5df/$FILE/G0110865.pdf) (last visited Feb. 1, 2004).

² The definition of trafficking has been a source of contention in the international community. It was not until the 2001 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime that a definition was included in a binding international instrument. See *infra* note 64. While persons can be trafficked for a variety of reasons, many women and girls are trafficked for sexual exploitation. Even those women who are trafficked for domestic labor or other purposes are often also sexually exploited. U.S. DEP'T OF STATE, VICTIMS OF TRAFFICKING AND VIOLENCE PROTECTION ACT 2000: TRAFFICKING IN PERSONS REPORT 1-2 (2002) [hereinafter DEP'T OF STATE TRAFFICKING REPORT], available at <http://www.state.gov/documents/organization/10815.pdf> (last visited Feb. 1, 2004). This Article is limited to analyzing trafficking for the purposes of sexual exploitation or prostitution.

³ Lin Lean Lim, *The Economic and Social Bases of Prostitution in Southeast Asia, in THE SEX SECTOR: THE ECONOMIC AND SOCIAL BASES OF PROSTITUTION IN SOUTHEAST ASIA* 1, 8 (Lin Lean Lim, International Labour Office ed., 1998) [hereinafter *THE SEX SECTOR*].

⁴ *Id.* at 1.

⁵ DEP'T OF STATE TRAFFICKING REPORT, *supra* note 2, at 2, available at <http://www.state.gov/documents/organization/10815.pdf>.

⁶ *Id.* The United States is primarily a transit and destination country for trafficking in persons. See, e.g., U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT (2001), available at <http://www.state.gov/g/tip/rls/tiprpt/2001> (last visited Feb. 1, 2004).

experiences for women in prostitution.⁷ A study examining the lives of prostituted women in five countries (South Africa, Thailand, Turkey, the United States, and Zambia) found that, “[a]veraging across countries, 81 percent reported being physically threatened in prostitution; 73 percent had been physically assaulted in prostitution; and 68 percent had been threatened with a weapon.”⁸ Over half stated that they had been raped since entering prostitution.⁹ Of those who had been raped, nearly half had been raped more than five times.¹⁰ Many of the women interviewed reported experiencing sexual or physical abuse as children.¹¹ The study also found that experiencing prostitution was a stronger variable than race, gender, or home country in predicting incidence of post-traumatic stress disorder, causing the authors to conclude that the “harm of prostitution is not a culture-bound phenomenon.”¹²

Trafficked women face additional acts of violence. Many are beaten and raped if they try to escape or refuse to have sex with customers.¹³ Some trafficked women are “subject to starvation, forced use of drugs and alcohol, burning with cigarettes, isolation in dark rooms, being beaten and threats to themselves or their families.”¹⁴ Additionally, because of their lack of appropriate documents and their treatment by state authorities as criminals rather than victims, trafficked women often “live in constant fear of police arrest, fines, imprisonment and expulsion.”¹⁵

Part II of this Article examines international documents’ treatment of trafficking women for prostitution. It first considers pre-United Nations conventions addressing the white slave trade and trafficking of white women and children. These instruments were gradually expanded to include all

⁷ See Melissa Farley et al., *Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder*, 8 FEMINISM & PSYCHOL. 405, 405–06, 412, 414, 415 (1998) (interviewing 475 individuals currently or recently prostituted, including several male and transgendered persons).

⁸ *Id.* at 405, 413, 415.

⁹ *Id.* at 415.

¹⁰ *Id.*

¹¹ *Id.* The women also experienced health, drug, and alcohol problems. *Id.* at 414.

¹² *Id.* at 419. The women’s average post-traumatic stress disorder severity scores were slightly higher than treatment-seeking U.S. Vietnam veterans. *Id.* at 416.

¹³ Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 87 (1994). Throughout, this Article refers to the purchaser of sex from the trafficked woman as “the customer.” It thus distinguishes the customer from the trafficker or pimp.

¹⁴ Review of Reports, Studies and Other Documentation for the Preparatory Committee and the World Conference [Against Racism, Racial Discrimination, Xenophobia and Related Intolerance], Preparatory Committee, 3d Sess., Provisional Agenda Item 4, ¶ 109, U.N. Doc. A/CONF.189/PC.3/5 (2001) [hereinafter 2001 Review of Reports] (submitted to the Secretary-General by the U.N. Special Rapporteur on Violence Against Women on the subject of race, gender, and violence against women), available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.189.PC.3.5.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.189.PC.3.5.En?Opendocument) (last visited Feb. 1, 2004).

¹⁵ *Id.*

women and to remove the issue of consent of the woman trafficked from consideration. The addition of language that required the punishment of those who traffic women even with their consent set the stage for the consent debate in later years. Part II then summarizes and scrutinizes U.N. documents involving trafficking for prostitution.

Part III focuses on the language of the international documents and explains their conceptual framework of trafficking for sexual exploitation. It analyzes how and in what context these documents incorporate the concepts of force, coercion, choice, and consent. It examines how the consent of the woman trafficked has become a critical factor in determining whether trafficking constitutes a human rights violation.

Part IV shifts the analysis to the demand side of the trafficking equation, examining the customer and his choice to purchase women for sexual use. The first section criticizes the omission of language holding men accountable for their actions as customers purchasing sex from women who have been trafficked. It also critiques the documents' failure to require governments to take action to reduce the demand for trafficked women. The second section examines the limited research on customer motivation, revealing that the customers themselves acknowledge that they are buying the opportunity to dominate, exercise power over, and sexually exploit women.

Part V analyzes the consequences of treating private choice and consent as determinative of whether trafficking for sexual exploitation is a human rights violation. The changes in language and perspective represented in successive U.N. documents reveal how the rhetoric in international documents privileges private choice and consent at the expense of equality. The focus on the trafficked woman's choice obscures the systemic inequality that facilitates trafficking and the sexual exploitation of women. This Part assesses why recent international human rights documents continue to privilege consent at the expense of equality, despite overwhelming evidence of the worldwide subordination of women and the research demonstrating that buying sex is an act of inequality.

The concluding Part argues that the privileging of consent and choice over equality and social justice is not inevitable. The history of the treatment of consent in U.N. trafficking documents demonstrates that human rights standards are dynamic and subject to changing interpretation. Centralizing women's equality in the human rights agenda can be realized if the international community recognizes the relevance of consent in sex trafficking as necessarily constitutive of gender dominance.

II. INTERNATIONAL DOCUMENTS ON TRAFFICKING

A. *The Emerging Recognition of Women's Human Rights in International Law*

Trafficking women for sexual exploitation is a pervasive practice that transcends borders. Addressing this complicated phenomenon in an effective way requires meaningful international standards, cooperation between nation-states, and powerful enforcement mechanisms. Historically, international law has been a method of regulating relationships between nations, focusing on the actions of states rather than those of individuals and private entities.¹⁶ However, it has gradually expanded to recognize human rights for all individuals.¹⁷ The end of World War II marked the emergence of an individual-focused international human rights law that acknowledged personal rights of redress for human rights violations and the accountability of those who engage in such violations.¹⁸

This expansion largely failed to include the human rights of women. Because women have historically been relegated to the private, domestic sphere, violations of women's rights have typically been ignored by public international law.¹⁹ Furthermore, the development of human rights jurisprudence occurred for the most part without women's involvement: even though "women were theoretically included within the nondiscrimination provisions of international documents, in actual practice, women were excluded, invisible, and silenced in the international process."²⁰

Not until 1975 and its designation by the United Nations as International Women's Year did the movement for women's human rights begin to materialize.²¹ The United Nations also declared the 1970s the United Nations Decade for Women and adopted the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"), bringing further attention to the human rights of women.²² More recently,

¹⁶ Berta Esperanza Hernández-Truyol, *Human Rights Through a Gendered Lens: Emergence, Evolution, Revolution*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 3, 11 (Kelly D. Askin & Doreen M. Koenig eds., 1999).

¹⁷ *Id.* at 11–14. Initially, these "individuals were, for the most part, those in whom the state had an interest, such as diplomatic personnel (diplomatic privileges and immunities), and nationals of foreign sovereigns." *Id.* at 11.

¹⁸ *Id.* at 14.

¹⁹ *Id.* at 3.

²⁰ *Id.* at 29.

²¹ *Id.* at 31.

²² Convention on the Elimination of All Forms of Discrimination Against Women, adopted Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981) [hereinafter CEDAW], available at <http://www1.umn.edu/humanrts/instrree/elcedaw.htm> (last visited Feb. 1, 2004). This Convention is a broad mandate requiring states to take action to address all forms of discrimination against women. At the time of this writing, 175 countries had ratified CEDAW. See, e.g., Patricia Kowsmann, *U.S. Criticized Over Lack of Support for CEDAW*, U.N. WIRE, June 27, 2003, available at http://www.unwire.org/UNWire/20030627/449_5884.asp (last visited Feb. 1, 2004). The United States is the only industri-

activists have been successful in bringing women's human rights concerns to the agendas of a series of world conferences;²³ and, in 1993, the U.N. General Assembly approved the Declaration on the Elimination of Violence Against Women, which broadly defines violence to include both public and private acts of violence.²⁴

Despite these important developments in women's international human rights, limitations continue to restrict the scope and effectiveness of such progress. Many of the international instruments addressing gender issues affirm formal gender equality²⁵ but leave unaddressed the structural inequalities that facilitate the subordination and disempowerment of women. Additionally, the development of separate international instruments on the rights of women has reinforced the tendency of mainstream international human rights bodies "to ignore the application of [general] human rights norms to women."²⁶ Of equal concern is that the instruments and procedures enacted to highlight women's international human rights appear to be implemented less cogently than their mainstream counterparts.²⁷

International human rights documents set the normative standards for the international community with respect to the establishment and enforcement of human rights. Over the last century, even before the found-

alized nation that has not ratified CEDAW, and its refusal to do so has sparked criticism both within the United States and abroad. *Id.*

²³ *E.g.*, Fourth World Conference on Women, Beijing, Sept. 4–15, 1995; World Summit for Social Development, Copenhagen, Mar. 6–12, 1995; International Conference on Population and Development, Cairo, Sept. 5–13, 1994; World Conference on Human Rights, Vienna, June 14–25, 1993; U.N. Conference on Environment and Development in Rio De Janeiro, June 3–14, 1992; World Conference to Review and Appraise the Achievements of the U.N. Decade for Women on Women, Nairobi, July 15–26, 1985. *See* Hernández-Truyol, *supra* note 16, at 31–32.

²⁴ Hernández-Truyol, *supra* note 16, at 33; Declaration on the Elimination of Violence Against Women, G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at arts. 3, 4, U.N. Doc. A/48/49 (1993), available at <http://www1.umn.edu/humanrts/instreetree/e4devw.htm> (last visited Feb. 1, 2004). This Declaration is an authoritative interpretation by the U.N. General Assembly of U.N. Charter and treaty obligations to enforce the right of women to be free from violence and the obligation of states to take action to eliminate violence against women.

²⁵ *See, e.g.*, Beijing Declaration and Platform for Action, Fourth World Conference on Women, Beijing, Sept. 4–15, 1995, ch. I, ¶ 1, U.N. Doc. A/CONF.177/20 (1995) ("[T]he principle of shared power and responsibility should be established between women and men at home, in the workplace and in the wider national and international communities."), available at <http://www1.umn.edu/humanrts/instreetree/e5dplw.htm#one> (last visited Feb. 1, 2004); Declaration on the Elimination of Violence Against Women, *supra* note 24 (asserting that women should have equal rights with men in law, education, and economic, political, and social life); CEDAW, *supra* note 22 (arguing that women should be able to exercise rights in the political, social, economic, and cultural realms on equal terms with men).

²⁶ Hilary Charlesworth, *What Are "Women's International Human Rights"?*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 58, 59 (Rebecca J. Cook ed., 1994) [hereinafter HUMAN RIGHTS OF WOMEN] (citing Andrew Byrnes, *Women, Feminism and International Human Rights Law—Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation? Some Current Issues*, 12 AUSTL. Y.B. INT'L L. 205, 216–23 (1992)).

²⁷ *Id.* (asserting that "international instruments dealing with women have weaker implementation obligations and procedures").

ing of the United Nations, a number of instruments have addressed the issue of trafficking of women.

B. Early International Human Rights Documents

Four early treaties dealt with international trafficking in women. Concern about white European women being trafficked for prostitution led to the adoption of the first international treaty on trafficking in 1904.²⁸ The treaty, while not explicitly making trafficking an international violation, obligated governments to gather information with regard to "the procurement of women or girls" for immoral purposes abroad.²⁹ It also required ratifying nations to determine the nationality of foreign women involved in prostitution with the goal of repatriation.³⁰ Six years later, the International Convention for the Suppression of the White Slave Traffic was adopted in Paris.³¹ This convention criminalized trafficking itself and established each state's duty to prohibit, prevent, prosecute, and punish trafficking.³²

In 1921, a third international instrument was signed, which included a further obligation to prosecute and extradite persons engaged in trafficking of children of both sexes and all, not just white, women.³³ It also required signatory nations to license and supervise employment agencies to "ensure the protection of women and children seeking employment in another country."³⁴ The final early convention was adopted in Geneva in 1933.³⁵ In addition to requiring signatory nations to share information regarding trafficking, the 1933 Convention specified that "[w]hoever, in order to gratify the passions of another person, has procured, enticed or led away *even with her consent*, a woman or girl of full age for immoral purposes to be carried out in another country, shall be punished"³⁶

²⁸ International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83 [hereinafter 1904 Agreement].

²⁹ *Id.* art. 1.

³⁰ *Id.* art. 3.

³¹ International Convention for the Suppression of the White Slave Traffic, May 4, 1910, 211 Consol. T.S. 45, 103 B.F.S.P. 244.

³² *Id.*

³³ International Convention for the Suppression of the Traffic in Women and Children, Sept. 30, 1921, 9 L.N.T.S. 415 (entered into force June 15, 1922), available at <http://www.austlii.edu.au/au/other/dfat/treaties/1922/10.html> (last visited Feb. 1, 2004).

³⁴ *Id.* art. 6.

³⁵ International Convention for the Suppression of the Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431 [hereinafter 1933 Convention], available at <http://www.austlii.edu.au/au/other/dfat/treaties/1936/12.html> (last visited Feb. 1, 2004).

³⁶ *Id.* art. 1 (emphasis added).

C. Contemporary International Human Rights Documents

1. *The 1949 Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others*

In an effort to consolidate the four previous international instruments that addressed trafficking of women and children, the United Nations issued the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others ("1949 Convention").³⁷ This instrument requires signatory nations to punish any person who "procures, entices, or leads away, for purposes of prostitution, another person, *even with the consent of that person*."³⁸ The Convention includes an obligation to punish any person who "exploits the prostitution of another person, *even with the consent of that person*."³⁹ It prohibits these acts without regard to the age, race, or gender of the person being trafficked.

The 1949 Convention expands criminal liability to include punishment for brothel owners and those who rent out their property for the purpose of the prostitution of others.⁴⁰ It obligates states to agree to undertake or at least encourage "measures for the prevention of prostitution and for the rehabilitation and social adjustment of the victims of prostitution."⁴¹ The convention provides that parties must report annually to the U.N. Secretary-General all "laws and regulations promulgated, relating to the subjects of the . . . Convention, as well as all measures taken . . . concerning the application of the Convention."⁴²

In 1959, the United Nations conducted a study to consider the effectiveness of the 1949 Convention.⁴³ In 1982, the Economic and Social Council requested an additional report to synthesize the previous studies on the traffic in persons and the exploitation of the prostitution of others; the report was published the following year.⁴⁴

³⁷ Convention for the Suppression of Traffic in Persons and of the Exploitation of the Prostitution of Others, *adopted* Mar. 21, 1950, 96 U.N.T.S. 271 (entered into force July 25, 1951) [hereinafter 1949 Convention], *available at* <http://www1.umn.edu/humanrts/instree/trafficinperson.htm> (last visited Feb. 1, 2004). Only seventy-six countries have ratified the 1949 Convention. The United States has not.

³⁸ *Id.* art. 1 (emphasis added).

³⁹ *Id.* (emphasis added).

⁴⁰ *Id.* art. 2.

⁴¹ *Id.* art. 16. Consistent with this requirement, the 1949 Convention also extends protections to the victims of trafficking by obligating states to repeal or abolish "any existing law, regulation or administrative provision by virtue of which persons who engage in or are suspected of engaging in prostitution are subject either to special registration or to the possession of a special document or to any exceptional requirements for supervision or notification." *Id.* art. 6.

⁴² *Id.* art. 21.

⁴³ U.N. DEP'T OF INT'L ECONOMIC & SOCIAL AFFAIRS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, U.N. Doc. ST/SOA/SD/8, U.N. Sales No. 59.IV.5 (1959) [hereinafter 1959 STUDY].

⁴⁴ *Activities for the Advancement of Women: Equality, Development and Peace: Report of Jean Fernand-Laurent, Special Rapporteur on the Suppression of the Traffic in Persons*

2. *1979 Convention on the Elimination of All Forms of Discrimination Against Women*

In 1979, the U.N. General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women.⁴⁵ The creation of CEDAW finally signaled the purposeful application of human rights concepts to women's experiences. CEDAW established an obligation of state parties to protect the rights of women and to eliminate all discrimination against women.⁴⁶

The Committee on the Elimination of Discrimination Against Women was created as the enforcement mechanism for CEDAW.⁴⁷ At least every four years, state parties must submit a report to the Committee that outlines the legislative, judicial, administrative, or other measures that they have adopted to give effect to CEDAW's provisions.⁴⁸ The 2000 Optional Protocol to CEDAW⁴⁹ is an important advancement in the enforcement realm because it allows individuals and groups to submit claims of violations of CEDAW rights to the Committee.⁵⁰

3. *Reports of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*

In 1993 the U.N. Commission on Human Rights created a Special Rapporteur on Violence Against Women, its Causes and Consequences, who reports to the U.N. High Commissioner for Human Rights. The mandate of the Special Rapporteur is to set out the parameters of the problem of violence against women, identify the corresponding international legal

and the Exploitation of the Prostitution of Others, U.N. ESCOR, Hum. Rts. Comm., 1st Sess., Agenda Item 12, U.N. Doc. E/1983/7 (1983) [hereinafter *1983 Report*]. A number of international instruments that focused on a wide range of human rights issues were adopted between 1959 and the request in 1982. *See, e.g.*, International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). In these instruments, trafficking was also directly addressed as part of a broader agenda for women's human rights. *See* World Conference of the International Women's Year, Mexico City, June 19–July 2, 1975 (urging governments to take action to avert forced recruitment of women and young girls into prostitution); *see also* CEDAW, *supra* note 22, art. 6, *available at* <http://www1.umn.edu/humanrts/instree/e1cedaw.htm>.

⁴⁵ CEDAW, *supra* note 22, *available at* <http://www1.umn.edu/humanrts/instree/e1cedaw.htm>.

⁴⁶ *Id.* art. 2.

⁴⁷ *Id.* art. 17.

⁴⁸ *Id.* art. 18. Through the Economic and Social Council, the Committee is authorized to make annual reports with recommendations and suggestions to the General Assembly. *Id.* art. 21.

⁴⁹ G.A. Res. 54/4, U.N. GAOR, 55th Sess., Annex 1, Supp. No. 49, at 5, U.N. Doc. A/54/49 (2000), *available at* http://www.unhchr.ch/html/menu3/b/opt_cedaw.htm (last visited Feb. 1, 2004).

⁵⁰ *Id.* art. 2.

issues, survey generally the incidents surrounding the problem, and investigate factual situations and allegations that are brought to the Special Rapporteur by concerned parties.⁵¹

The Special Rapporteur has issued a number of reports addressing the issue of trafficking in women. In 1996, she conducted a factfinding mission to Poland, investigating and publishing a report on the issue of trafficking and forced prostitution of women in Poland.⁵² The following year, she issued a report on violence in the community, including trafficking in women and forced prostitution.⁵³ Recent reports by the Special Rapporteur describe the context within which trafficking takes place⁵⁴ and offer region-specific analyses.⁵⁵

In February of 2003, the Special Rapporteur issued a 435-page report of global developments in the area of violence against women during the period from 1994 to 2003. This comprehensive document addresses advances in anti-trafficking work as well as remaining challenges. It also examines recent developments concerning the right of women to live free from a wide range of gender-based violence.⁵⁶

⁵¹ *Preliminary Report Submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, Hum. Rts. Comm., 50th Sess., Provisional Agenda Item 11(a), U.N. Doc. E/CN.4/1995/42 (1994) (outlining the mandate and methods of the Special Rapporteur, the nature of the problem of violence against women, and preliminary recommendations), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/75ccfd797b0712d08025670b005c9a7d?Opendocument> (last visited Feb. 1, 2004). For more information on the Special Rapporteur and a comprehensive list of her publications and press releases, see the Special Rapporteur's website at <http://www.unhchr.ch/html/menu2/7/b/mwom.htm> (last visited Feb. 1, 2004).

⁵² *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, Hum. Rts. Comm., 53rd Sess., Agenda Item 9(a), addendum 1, U.N. Doc. E/CN.4/1997/47/Add.1 (1996) [hereinafter *Poland Report of Special Rapporteur*], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5bd87fea5f980b1c802566b200520c02?Opendocument> (last visited Feb. 1, 2004).

⁵³ *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR Hum. Rts. Comm., 53d Sess., Provisional Agenda Item 9(a), U.N. Doc. E/CN.4/1997/47 (1997) [hereinafter *1997 Report of Special Rapporteur*], available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/043c76f98a706362802566b1005e9219?Opendocument> (last visited Feb. 1, 2004).

⁵⁴ See, e.g., *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. ESCOR, Hum. Rts. Comm., 56th Sess., Agenda Item 12(a), U.N. Doc. E/CN.4/2000/68 (Feb. 29, 2000) [hereinafter *2000 Report of Special Rapporteur*] (discussing trafficking in women, women's migration, and violence against women), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf) (last visited Feb. 1, 2004). In 2001, the Special Rapporteur issued a report in conjunction with the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. While the report does not focus specifically on trafficking, it concludes that racial and gender discrimination create a dynamic in which women are vulnerable to trafficking and prostitution. See *2001 Review of Reports*, *supra* note 14, ¶ 97, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.189.PC.3.5.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.189.PC.3.5.En?Opendocument).

⁵⁵ *2001 Report of Special Rapporteur*, *supra* note 1 (focusing on trafficking in and originating from Bangladesh, Nepal, and India) available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cb26594f04a53a4c1256a1b0055e5df/\\$FILE/G0110865.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4cb26594f04a53a4c1256a1b0055e5df/$FILE/G0110865.pdf).

⁵⁶ *Report of the Special Rapporteur on Violence Against Women, Its Causes and Con-*

4. *The International Labour Organization's 1998 Study of Prostitution*

The International Labour Organization is a specialized agency of the United Nations that monitors international labor standards and promotes fair and humane labor conditions for women, men, and children.⁵⁷ In 1998, the ILO undertook a study of the economic and social bases of prostitution in Southeast Asia.⁵⁸ This study recognizes the increasing economic importance and expanding international dimension of prostitution.⁵⁹ It examines prostitution in Indonesia, Malaysia, the Philippines, and Thailand⁶⁰ and specifically addresses the issue of child prostitution.⁶¹ The study concludes with policy considerations and suggestions for future action concerning the sex industry. It proposes that child prostitution be treated more seriously than adult prostitution and that preventative programs be instituted to address the economic reasons that some parents allow their children to enter prostitution.⁶²

5. *2001 Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*

A new U.N. Convention Against Transnational Organized Crime was opened for nations' signatures in December of 2000.⁶³ One of its supplementary protocols, added in 2001, is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("2001 Protocol").⁶⁴ The 2001 Protocol recognizes that trafficked persons are not

sequences: International, U.N. ESCOR, Hum. Rts. Comm., 59th Sess., Agenda Item 12(a), addendum 1, U.N. Doc. E/CN.4/2003/75/Add.1 (2003), available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/\\$FILE/G0311304.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/a9c6321593428acfc1256cef0038513e/$FILE/G0311304.pdf) (last visited Feb. 1, 2004).

⁵⁷ See International Labour Organization, *About the ILO*, available at <http://www.ilo.org/public/english/about/index.htm> (last visited Feb. 1, 2004).

⁵⁸ Lim, *supra* note 3, at 10.

⁵⁹ THE SEX SECTOR, *supra* note 3, at v.

⁶⁰ *Id.* at vi.

⁶¹ *Id.* at v-vi; Lin Lean Lim, *Child Prostitution*, in THE SEX SECTOR, *supra* note 3, at 170, 170-205.

⁶² Lin Lean Lim, *Whither the Sex Sector? Some Policy Recommendations*, in THE SEX SECTOR, *supra* note 3, at 206, 212, 219.

⁶³ See JANICE G. RAYMOND, GUIDE TO THE NEW U.N. TRAFFICKING PROTOCOL 1 (2001), available at http://action.web.ca/home/catw/readingroom.shtml?sh_item=ebe1536f81ad11e9841982f32874244c (last visited Feb. 1, 2004).

⁶⁴ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, *opened for signature* Dec. 12, 2000, G.A. Res. 55/25, U.N. GAOR, 55th Sess., Supp. No. 49, Annex 2 at 60, art. 3(a), U.N. Doc. A/45/49 (Vol. 1) (2001) [hereinafter 2001 Protocol], available at <http://www1.umn.edu/humanrts/instree/trafficking.html> (last visited Feb. 1, 2004).

criminals but victims who should be protected and assisted.⁶⁵ The protocol also establishes obligations for state parties to cooperate in preventing and combating trafficking and to criminalize trafficking.⁶⁶

6. 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking

One of the U.N.'s most recent documents on trafficking is the Recommended Principles and Guidelines on Human Rights and Human Trafficking ("2002 Recommended Principles").⁶⁷ According to the then U.N. High Commissioner for Human Rights, the report recognizes that previous "attempts to deal with trafficking have been *ad hoc*, sporadic and largely ineffective."⁶⁸ As a result, the High Commissioner made the issue of trafficking a priority. While the 2002 Recommended Principles is not an enforceable international instrument, the High Commissioner described it as one of the most significant outputs of the Office's anti-trafficking program, intended to "promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions and to serve as a framework and reference point for the work of the Office of the High Commissioner on this issue."⁶⁹

These contemporary international documents are central to the continuing debate about how trafficking for sexual exploitation is defined and which acts of trafficking constitute human rights violations.

III. THE CHANGING ROLE OF CONSENT IN THE INTERNATIONAL DEBATE ON SEX TRAFFICKING

Nonconsent and the use of force or coercion by traffickers have emerged in recent international human rights documents as essential, yet controversial, elements of human rights violations in the context of trafficking.⁷⁰ In addressing this issue, the U.N. has moved from the ap-

⁶⁵ *Id.* arts. 2, 6.

⁶⁶ *Id.* arts. 2, 5.

⁶⁷ *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Report of the United Nations High Commissioner for Human Rights, Addendum*, U.N. ESCOR, Substantive Sess. 2002, Provisional Agenda Item 14(g), addendum 1, U.N. Doc. E/2002/68/Add.1 (2002) [hereinafter *2002 Recommended Principles*], available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument) (last visited Feb. 1, 2004).

⁶⁸ *Report of the United Nations High Commissioner for Human Rights*, U.N. ESCOR, Substantive Sess. 2002, Provisional Agenda Item 14(g), U.N. Doc. E/2002/68, ¶¶ 60–61, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4ae8963868827d59c1256bf3004fdbd8/\\$FILE/N0240156.doc](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/4ae8963868827d59c1256bf3004fdbd8/$FILE/N0240156.doc) (last visited Feb. 1, 2004).

⁶⁹ *Id.* ¶ 62.

⁷⁰ See, e.g., THE SEX SECTOR, *supra* note 3, at v; 2001 Protocol, *supra* note 64, art 3(a) & (b); 2000 Report of Special Rapporteur, *supra* note 54, ¶ 10, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G00113](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G00113)

proach of the 1949 Convention, which specifically declares that consent of the trafficked person is not a defense against a charge of trafficking, to the Special Rapporteur on Violence Against Women's position, which has changed over time to make "force" central to trafficking and to accept consent as a defense. The 1998 ILO study suggests that adults can freely choose sex work.⁷¹ The most recent binding international instrument, the 2001 Protocol, adopts a definition of trafficking that broadens the concept of force but fails to eliminate consent as a defense to trafficking. The changes in language, and the viewpoint that these changes reflect, reveal an increasing focus in the trafficking debate on the consent of the woman trafficked.

In fact, consent has become the pivotal factor in determining whether an act of trafficking constitutes a human rights violation. This focus on consent obscures the larger issue of gender inequality that underlies and fuels the sex trafficking and prostitution industries. In order to address the inequality inherent in trafficking for sexual exploitation, the international human rights community should return to its stance in early documents that do not allow consent as a defense to trafficking but instead focus on the harm done.

A. International Documents in Which Consent Is Not an Issue

1. Early Trafficking Documents

The instruments pre-dating the United Nations either do not focus on the issue of consent⁷² or explicitly remove the trafficked woman's consent as a defense to the crime of trafficking for immoral purposes.⁷³

34.pdf. Only recently in the international trafficking debate have attempts been made to decouple consent to trafficking for the purposes of illegal immigration from trafficking for prostitution and sexual exploitation. In some instances, women may consent to being transported across borders without agreeing to prostitution or work in the sex industry. However, some anti-trafficking groups, including the Coalition Against Trafficking in Women, argue that most women who are trafficked "are recruited, transported, sold or purchased for the specific purpose of prostitution and sexual exploitation." COALITION AGAINST TRAFFICKING IN WOMEN, WRITTEN STATEMENT TO THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS 57TH SESSION [sic] ¶ 4 (2001), available at http://action.web.ca/home/catw/readingroom.shtml?sh_tm=5bf430c8473ad9836c9695d106d71808 (last visited Feb. 1, 2004). Further, "a large number of women trafficked for domestic labor often end up being sexually exploited, with many of these women recruited into the sex industry." *Id.* See also DEP'T OF STATE TRAFFICKING REPORT, *supra* note 2, available at <http://www.state.gov/documents/organization/10815.pdf>.

⁷¹ The ILO further argues that, given the crucial and intransigent nature of the sex industry in domestic and international economies, prostitution should be officially recognized as part of a state's economy so that it can be taxed. Lim, *Whither the Sex Sector?*, *supra* note 62, at 213.

⁷² Rather, they contain language that concerns "procurement of women or girls" for immoral purposes abroad. 1904 Agreement, *supra* note 28, art. 1.

⁷³ See 1933 Convention, *supra* note 35, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1936/12.html>.

2. *The 1949 Convention*

The international convention on trafficking currently in effect, the 1949 Convention, lacks explicit definitions of either trafficking or prostitution.⁷⁴ Some commentators contend the Convention is ambiguous as to whether it includes all forms of prostitution or only forced prostitution.⁷⁵ The 1949 Convention's text makes clear, however, that it covers all trafficking and prostitution. First, the language of the Convention does not include the modifier "forced" when referring to prostitution, suggesting that it intends to prohibit all migration of persons for commercial sexual purposes.⁷⁶ Second, the 1949 Convention reiterates the admonition from the 1933 Convention that consent does not absolve the actions of the trafficker because consent is a defense neither to trafficking nor to the exploitation of prostitution of others.⁷⁷ Finally, the preamble to the Convention states that "prostitution and the accompanying evil of the traffic in persons for the purpose of prostitution are incompatible with the dignity and worth of the human person and endanger the welfare of the individual, the family and the community."⁷⁸ Indeed, even the Special Rapporteur has declared that "[u]nder the Convention, prostitution, even with the consent of all parties, is forbidden."⁷⁹ Consequently, the Convention obligates parties to punish persons who engage in trafficking regardless of whether the resulting prostitution is labeled "forced."⁸⁰

⁷⁴ 1949 Convention, *supra* note 37, art. 1 (requiring only that states sanction any person who "procures, entices, or leads away, for purposes of prostitution another person, even with the consent of that person"), available at <http://www1.umn.edu/humanrts/instree/traffickingperson.htm>.

⁷⁵ See, e.g., Janie Chuang, *Redirecting the Debate Over Trafficking in Women: Definitions, Paradigms, and Contexts*, 11 HARV. HUM. RTS. J. 65, 77 (1998) ("[W]hile it is clear that States Parties are to refrain from regulating prostitution and prosecuting prostitutes, it is unclear whether, in requiring states to combat the 'exploitation of prostitution,' such efforts are to be targeted at all forms of prostitution or only forced prostitution."); Nora V. Demleitner, *Forced Prostitution: Naming an International Offense*, 18 FORDHAM INT'L L.J. 163, 174 (1994) ("While the title of the . . . Convention speaks of the 'exploitation of prostitution,' the text tends to refer solely to prostitution. This created a certain degree of ideological confusion, since the [1949] Convention's focus remained ambiguous as to whether all kinds of prostitution or only forced prostitution were at issue.").

⁷⁶ Treaties are interpreted pursuant to the rules of the Vienna Convention on the Law of Treaties: in good faith "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of [its] object and purpose." Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, art. 31, 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980), available at <http://www.un.org/law/ilc/texts/treaties.htm> (last visited Feb. 1, 2004).

⁷⁷ 1949 Convention, *supra* note 37, art. 1, available at <http://www1.umn.edu/humanrts/instree/traffickingperson.htm>.

⁷⁸ *Id.* pmbl.

⁷⁹ *Poland Report of Special Rapporteur*, *supra* note 52, ¶ 75, available at <http://www.unhcr.ch/Huridocda/Huridocda.nsf/TestFrame/5bd87fea5f980b1c802566b200520c02?OpenDocument>.

⁸⁰ As is consistent with the historical principle that international instruments are restricted to relations between countries and do not govern domestic matters, the terms of the treaty do not criminalize prostitution *per se*. However, some countries have refused to rat-

3. *The 1959 Study*

Subsequent U.N. documents support the view, embodied by the 1949 Convention, that no distinction should be made between forced and other forms of prostitution. The 1959 Study, which considers the efficacy of the 1949 Convention, recommends that to address the issue of trafficking fully, a program must "include in its scope the problem of prostitution itself."⁸¹ The 1959 Study never implies its recommendations are limited to forced prostitution.⁸² It does advocate, however, that the regulation of prostitution, which presupposes the legality of prostitution, be abolished.⁸³ It suggests that this action be part of a comprehensive plan that includes steps for the "maintenance of public order, the prevention of venereal disease, the suppression of the exploitation of the prostitution of others, the prevention of prostitution, and the rehabilitation of persons engaged in prostitution."⁸⁴ Such support for the abolition of the regulation of prostitution and the need to address the issue of prostitution itself indicates that the 1959 Study does not require lack of consent as a necessary element of trafficking.

4. *The 1983 Report*

In 1983, the Special Rapporteur appointed to synthesize the previous trafficking studies issued a report.⁸⁵ The report concluded that despite U.N. efforts, prostitution was spreading and was extending to girls at younger ages.⁸⁶ The 1983 Report identifies its strategy for addressing prostitution as a human rights approach that considers prostitution "a form of slavery."⁸⁷ The Special Rapporteur explained:

Like slavery in the usual sense, prostitution has an economic aspect. While being a cultural phenomenon rooted in the masculine and feminine images given currency by society, it is a market and indeed a very lucrative one. The merchandise involved is men's pleasure, or their image of pleasure. This merchandise is unfortunately supplied by physical intimacy with women or children. Thus, the alienation of the person is here more far-

ify the 1949 Convention because of their domestic schemes legalizing and regulating prostitution. See Lois Chiang, *Trafficking in Women*, in 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW, *supra* note 16, at 357.

⁸¹ 1959 STUDY, *supra* note 43, at 6.

⁸² *Id.*

⁸³ *Id.* at 8.

⁸⁴ *Id.* at 9.

⁸⁵ 1983 Report, *supra* note 44.

⁸⁶ *Id.* at 5.

⁸⁷ *Id.* at 6.

reaching than in slavery in its usual sense, where what is alienated is working strength, not intimacy.⁸⁸

The analysis presented in the 1983 Report does not distinguish trafficking for sexual exploitation from prostitution. Furthermore, it makes no distinction between forced prostitution and other forms of prostitution. Relying upon testimonies by three collectives of women in prostitution, the report asserts that "even when prostitution seems to have been chosen freely, it is actually the result of coercion."⁸⁹

In recommending elements for a national policy, the 1983 Report suggests both short- and long-term goals. Like the 1949 Convention, the 1983 Report argues that the immediate task is to combat procurement "while aiming in the long term at reducing actual prostitution."⁹⁰ The report concludes that achieving these goals requires "the abolition of sexist discrimination in general," the decriminalization of prostitutes' actions, the criminalization of clients' actions, the reduction of economic and social inequalities among and within countries, and the provision of a variety of well-paid jobs for women.⁹¹

5. Recommendation 19 of CEDAW and the CEDAW Committee on the Elimination of Discrimination Against Women

Article 6 of CEDAW⁹² directs parties to "take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women."⁹³ While this instrument does not explicitly discuss the issue of consent, its preamble's recognition that discrimination against women violates principles of equal rights and respect for human dignity⁹⁴ indicates that the document is a commitment to end discrimination against women and promote equality between women and

⁸⁸ *Id.* at 7.

⁸⁹ *Id.* at 8. In their testimonies, the women described their experiences of prostitution, stating that they were forced into prostitution because of their lack of economic resources, the need to escape from familial sexual abuse or violence, or coercion by procurers. *Id.*

⁹⁰ *Id.* at 18.

⁹¹ *Id.* at 20–22.

⁹² CEDAW includes requirements for state parties to eliminate discrimination against women in the areas of social, public, and political life, including education, employment, health care, and marital and family relations. *Id.* Recognizing the social and cultural institutions that support inequality, CEDAW instructs state parties to take all appropriate measures "[t]o modify the social and cultural patterns of conduct of men and women" in order to eliminate prejudices, customs, "and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women . . ." CEDAW, *supra* note 22, art. 5, available at <http://www1.umn.edu/humanrts/instrree/cedaw.htm>.

⁹³ *Id.* art. 6.

⁹⁴ *Id.* pmb. The preamble asserts that discrimination against women "is an obstacle to the participation of women, on equal terms with men, in . . . political, social, economic and cultural life . . ." *Id.*

men. By implication, the requirement of Article 6 to suppress trafficking and exploitation of prostitution is a recognition that these practices are discriminatory. Thus, regardless of whether consent is present, CEDAW seems to conceive of trafficking and prostitution as violating the principles of equality and respect for human dignity and as inconsistent with its goal of equal rights for all people.

The work of the Committee on the Elimination of Discrimination Against Women, CEDAW's enforcement body, also supports the perspective that consent should be considered irrelevant in the prostitution and trafficking of women. In 1992, the Committee issued Recommendation 19,⁹⁵ considered an authoritative interpretation of CEDAW by the international human rights community.⁹⁶ Recommendation 19 discourages "commercial exploitation of women as sexual objects, rather than as individuals," because such commercial exploitation "contributes to gender-based violence,"⁹⁷ which is "a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men."⁹⁸ Recommendation 19 also asserts that "[g]ender-based violence . . . is discrimination within the meaning of article 1 of the Convention."⁹⁹

Regarding trafficking and prostitution specifically, Recommendation 19 points out that "new forms of sexual exploitation, such as sex tourism,"¹⁰⁰ now exist. It then states that such practices are "incompatible

⁹⁵ *Report of the Committee on the Elimination of Discrimination Against Women*, U.N. GAOR, 47th Sess., Supp. No. 38, U.N. Doc. A/47/38 (1992) [hereinafter *Recommendation 19*], available at <http://www1.umn.edu/humanrts/gencomm/generl19.htm>.

⁹⁶ See, e.g., Elizabeth M. Misiaveg, *Important Steps and Instructive Models in the Fight to Eliminate Violence Against Women*, 52 WASH. & LEE L. REV. 1109, 1126 (1995).

⁹⁷ *Recommendation 19*, *supra* note 95, ¶ 12, available at <http://www1.umn.edu/humanrts/gencomm/generl19.htm>. Gender-based violence is defined in Recommendation 19 as "violence that is directed against a woman because she is a woman or that affects women disproportionately," including "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty." *Id.* ¶ 6.

⁹⁸ *Id.* ¶ 1.

⁹⁹ *Id.* ¶ 7. Article 1 of CEDAW defines discrimination against women as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing . . . the enjoyment or exercise by women[,] . . . on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW, *supra* note 22, art. 1, available at <http://www1.umn.edu/humanrts/instree/cedaw.htm>.

¹⁰⁰ *Recommendation 19*, *supra* note 95, ¶ 14, available at <http://www1.umn.edu/humanrts/gencomm/generl19.htm>. The World Tourism Organization defines "sex tourism" as "trips organized within the tourism sector, or from outside the sector but using its structures and networks, with the primary purpose of effecting a commercial sexual relationship by the tourist with residents at the destination . . ." World Tourism Organization Statement on the Prevention of Organized Sex Tourism, General Assembly of the World Tourism Congress, adopted Oct. 17, 1995, 11th sess., Res. A/RES/338(XI).

with the equal enjoyment of rights by women" and "put women at special risk of violence and abuse."¹⁰¹

No distinction is made between forced and voluntary prostitution presumably because such a dichotomy would be inconsistent with Recommendation 19's acknowledgement of the gendered violence of sexual exploitation and how that violence reinforces inequality.¹⁰² Because Recommendation 19 addresses the issue of violence within a specific inequality context, force and consent are nonissues in the discussion of trafficking; rather, the analysis focuses on how gendered violence supports inequality.

B. Documents in Which Consent Is an Issue

While close examination of the language of the 1949 Convention, the 1959 Study, the 1983 Report, and CEDAW reveals that these instruments are not limited to instances of forced prostitution, subsequent international documents reflect a changing rhetoric surrounding the issue of private choice and consent, resulting in the marginalization of the goal of equality.

1. The Changing View of the Special Rapporteur on the Relevance of Consent

The Special Rapporteur has acknowledged that her view on whether forced prostitution is distinguishable from consensual prostitution has evolved.¹⁰³ While the reports of the Special Rapporteur do not bind countries, her recommendations and comments can be influential in exposing issues to and influencing the international community.

The Special Rapporteur's 1996 Poland Report uses the language of trafficking and "forced prostitution" but takes a neutral position on whether voluntary prostitution should be distinguished from forced prostitution. The Special Rapporteur describes the conflicting views regarding the issue of consensual prostitution in the context of the 1949 Convention.¹⁰⁴ She then notes that many groups have criticized the 1949 Convention for

¹⁰¹ Recommendation 19, *supra* note 95, ¶ 14, available at <http://www1.umn.edu/humanrts/gencomm/gener119.htm>. Citing one reason why women are particularly at risk, Recommendation 19 acknowledges that women in prostitution are "especially vulnerable to violence . . ." *Id.* ¶ 15.

¹⁰² Indeed, the only reference Recommendation 19 makes to force is the declaration that "[p]overty and unemployment force many women . . . into prostitution." *Id.* ¶ 15.

¹⁰³ See 2000 Report of Special Rapporteur, *supra* note 54, ¶ 5, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹⁰⁴ Poland Report of Special Rapporteur, *supra* note 52, ¶ 75, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/5bd87fea5f980b1c802566b200520c02?OpenDocument>. The Special Rapporteur also criticizes the 1949 Convention as lacking a monitoring mechanism and no compulsory reporting requirement. *Id.* ¶ 74.

criminalizing all prostitution, regardless of consent.¹⁰⁵ Some take the position that voluntary prostitution should be allowed and that it is inappropriate for the state “to intervene in the private lives of citizens”; rather, “the basis of State intervention should be whether the [woman] is being prostituted or trafficked against her will.”¹⁰⁶ Others, however, assert that prostitution is inherently demeaning and thus “consent should not be a factor in its criminalization.”¹⁰⁷ The 1996 Poland Report notes that “[t]hese groups argue that economic factors essentially predetermine choice and that it is not plausible that women voluntarily become victims of trafficking and prostitution.”¹⁰⁸

The Special Rapporteur then expresses her own view that a “fuller discussion of these issues is required before any final conclusions are reached.”¹⁰⁹ She stresses that her primary concern is that violations of human rights and “violence as defined by the United Nations Declaration on the Elimination of Violence Against Women be prohibited and punished.”¹¹⁰ Consequently, the Special Rapporteur does not align herself with either the position that prostitution can be freely chosen and consensual or the view that prostitution is a human rights violation because it is inherently violent and demeaning to women.

The Special Rapporteur issued another report on sex trafficking in 1997.¹¹¹ Like its predecessor, the 1997 Report uses the language of “forced prostitution” and notes that “there exists no consensus within the international community regarding the definition of trafficking in women. In fact, trafficking, due to its traditional conceptualization in terms of prostitution, is an extremely divisive issue”¹¹²

The Special Rapporteur’s 2000 Report, dealing expressly with the trafficking of women, women’s migration, and violence against women, “details the evolution of the Special Rapporteur’s position on trafficking.”¹¹³ The Special Rapporteur reformulates a taxonomy she set out in the 1997 Report with regard to the legal approaches to prostitution,¹¹⁴ redefining

¹⁰⁵ *Id.* ¶ 75.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* ¶ 76.

¹¹⁰ *Id.*

¹¹¹ *1997 Report of Special Rapporteur*, *supra* note 53, available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/043c76f98a706362802566b1005e9219?Opendocument>.

¹¹² *Id.* § IV.

¹¹³ *2000 Report of Special Rapporteur*, *supra* note 54, Executive Summary, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹¹⁴ *1997 Report of Special Rapporteur*, *supra* note 53, § IV(B), available at <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/043c76f98a706362802566b1005e9219?Opendocument>. The Special Rapporteur identifies four domestic legal schemes that have been used to address prostitution—prohibitionism, abolitionism, regulationism, and decriminalization—noting that the “decriminalization paradigm views prostitution as work

her category of "decriminalization" as "decriminalization combined with a human rights approach."¹¹⁵ This new strategy involves "decriminalization of prostitution and related acts, and the application of existing human rights and labor rights to sex workers and sex work."¹¹⁶

The 2000 Report reiterates the lack of an agreed-upon definition of trafficking, positing, however, that most agree that the "historical characterizations of trafficking are outdated, ill-defined and non-responsive to the current realities"¹¹⁷ The 2000 Report emphasizes that it "is the non-consensual nature of trafficking that distinguishes it from other forms of migration."¹¹⁸ Further, it "is the non-consensual and exploitive or servile nature of the purpose with which the definition [of trafficking] concerns itself."¹¹⁹ Based on this view, the Special Rapporteur creates the following definition:

Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons:

(i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:

(ii) placing or holding such person, whether for pay or not, in forced labour or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).¹²⁰

This definition marks a fundamental change in the elements of trafficking. First, it requires a showing of force or coercion. With nonconsent as its linchpin, the proposed definition is contrary to the 1949 Convention, the primary international document still in force that addresses trafficking. The 1949 Convention, in its description of trafficking, included the phrase, "even with the consent of the person"¹²¹ The Special Rapporteur's definition not only omits this language, but also specifically requires a trafficker's use of force and/or coercion. Also contrary to the

and . . . is focused on the coercion and violence rather than on prostitution itself and seeks . . . to address working conditions and the rights of prostitutes." *Id.*

¹¹⁵ 2000 Report of Special Rapporteur, *supra* note 54, ¶ 21, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 10.

¹¹⁸ *Id.* ¶ 12.

¹¹⁹ *Id.* ¶ 13.

¹²⁰ *Id.*

¹²¹ 1949 Convention, *supra* note 37, art. 1, available at <http://www1.umn.edu/humanrts/instreet/trafficingperson.htm>.

elements of the 1949 Convention, consent is a defense under the 2000 Report's definition of trafficking.

The Special Rapporteur's 2000 Report also limits the prohibited purposes of trafficking to forced labor and slavery-like practices.¹²² Unlike earlier instruments, such as the 1949 Convention, the report makes no mention of sexual exploitation or prostitution. Consequently, prostitution becomes subsumed into the category of "forced labor." While admittedly women are trafficked for purposes other than prostitution, this definition is problematic because it rejects Recommendation 19's emphasis on gender-based violence as a human rights violation.¹²³ Essentially, the 2000 Report's definition makes the problem of sexual exploitation invisible, as a labor rights approach cannot adequately address the problem of trafficking for prostitution.¹²⁴

These changes in the definition of trafficking, along with new language referring to "sex work" and "sex workers," signal the Special Rapporteur's shift in position.¹²⁵ The Special Rapporteur has apparently sided with those who feel that prostitution is not a human rights violation but rather a personal, private work choice. Consistent with the Special Rapporteur's increased emphasis on consent, the 2000 Report asserts that the 1949 Convention fails to "regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the 'evils of prostitution.'"¹²⁶ One of the main criticisms levied against the 1949 Convention and other prohibitionist approaches to trafficking and prostitution is that eliminating a person's ability to consent to be trafficked for prostitution fails to treat her as an autonomous actor, casting her in the role of victim in need of protection. This assertion that prohibiting the selling of sex for money constrains women's autonomy is central to the argument that prostitution is an expression of women's sexual autonomy and a valid form of work.¹²⁷

The Special Rapporteur's previous criticism focusing on the Convention's lax enforcement provisions does not justify incorporating consent into the definition of trafficking she drafted in the 2000 Report.

¹²² 2000 Report of Special Rapporteur, *supra* note 54, ¶ 13, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹²³ See *supra* text accompanying notes 95–102.

¹²⁴ See *infra* text accompanying notes 128–139 (examining the position of the ILO with regard to recognizing prostitution as a legal occupation).

¹²⁵ See, e.g., 2000 Report of Special Rapporteur, *supra* note 54, ¶¶ 17, 21, 22, 24, 40, 48, 49, 64, 66, 81–86, 91, 117, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹²⁶ *Id.* ¶ 22.

¹²⁷ See, e.g., SEX WORK: WRITINGS BY WOMEN IN THE SEX INDUSTRY (Frédérique Delacoste & Priscilla Alexander eds., 2d ed. 1998) [hereinafter SEX WORK]; WHORES AND OTHER FEMINISTS (Jill Nagle ed., 1997); SHANNON BELL, READING, WRITING, AND RE-WRITING THE PROSTITUTE BODY (1994); Drucilla Cornell, *A Defense of Prostitutes' Self-Organization*, 1 CARDOZO WOMEN'S L.J. 121 (1993).

Therefore, in order to justify the definition put forth in the report, it is necessary for her now to assert that the substance of the 1949 Convention does not respect the autonomy of women. The 2000 Report seems to adopt the view that furthering women's autonomy and choice furthers women's equality. That approach leaves unexamined the differential in political, social, economic, and cultural power between women and their traffickers and women and their customers.

2. *The International Labour Organization's 1998 Study*

The position in the 2000 Special Rapporteur's Report that consent is determinative of whether there is a human rights violation is consistent with the ILO's views.¹²⁸ Although its 1998 study of the sex sector in South-east Asia reports an abundance of evidence showing that prostitution is often coercive, the ILO nonetheless concludes that work in the sex sector can be freely chosen.¹²⁹

The ILO study makes clear that the crucial elements behind the continued growth and support of the sex industry are domestic economic policies and development strategies.¹³⁰ In its examination of the sex sector in Thailand, the study illustrates the link between the economic development process and the growth of the sex industry:

Thailand's process of economic development has . . . affected females in the rural labor force more than males. As in many other countries, increasing productivity in agriculture in Thailand has been associated with decreasing opportunities in agri-

¹²⁸ See *THE SEX SECTOR*, *supra* note 3, at v.

¹²⁹ Lim, *supra* note 62, at 212.

¹³⁰ Furthermore, the failure of the international community to address effectively the problem of trafficking stems in part from states' fiscal interests in the sex trade. In her study of the meaning and nature of prostitution, Julia O'Connell Davidson discusses the relationship of state economic and labor regulations to prostitution, observing that prostitution is a point at which state power and economic regulation intersect:

[T]he truth of the matter is that governments—and indeed national and international capital—benefit from prostitution. It operates as a kind of alternative "welfare" system in most countries of the world and so reduces the level of state expenditure necessary to ensure the reproduction of labour and also provides a means by which to supplement below-subsistence wages. In countries where brothel prostitution is legal there are also fiscal benefits for the state, as indeed there are financial benefits from "taxes" levied by means of fining prostitutes. In tourist-related prostitution the benefits for national states and national and international capital are yet more obvious. And yet governments are rarely willing to acknowledge an interest in ensuring the conditions under which clients can obtain access to prostitutes in the same way that they will acknowledge their concern to ensure conditions for capital accumulation . . .

JULIA O'CONNELL DAVIDSON, *PROSTITUTION, POWER AND FREEDOM* 193 (1998) (citation omitted).

cultural wage employment for women and increasing opportunities for men.

... The growth of urban economic opportunities has led to increased levels of female migration. ... Unfortunately, female rural-urban migrants are confronted with low-paid urban jobs

...¹³¹

These economic patterns have created a continuing supply of poor, desperate, and vulnerable women, as well as a corresponding increase in men's income and thus in their ability to purchase women in prostitution.¹³²

The 1998 study describes how the commercial sex sector has become an entrenched part of the examined countries' economies and yields a significant portion of their gross domestic products ("GDP").¹³³ In Indonesia, "the financial turnover of the sex sector was estimated at between US\$1.2 and 3.3 billion per year, or between 0.8 and 2.4 per cent of the country's GDP."¹³⁴ In Thailand, annual income from prostitution was estimated to be between "US\$22.5 and \$27 billion . . . or about 10 to 14 per cent of the GDP."¹³⁵ The study notes that, in each of the countries examined, the "sex sector flourishes . . . because it is protected and supported by corrupt politicians, police, armed forces and civil servants, who receive bribes, demand sexual favors and are themselves customers of the sex establishments, or may even be partners or owners of the establishments."¹³⁶ There is also ample evidence of governmental involvement in trafficking.¹³⁷

The 1998 ILO study acknowledges that the 1949 Convention does not make a distinction between trafficking for forced as opposed to voluntary prostitution¹³⁸ and that it does not recognize prostitution as legitimate work. Although the study initially asserts that it does not take a position on whether prostitution should be legalized, it later "concede[s] that it may be possible to make a distinction between prostitution as a freely chosen form of work and prostitution through coercion."¹³⁹

In contrast, the ILO study asserts "that child prostitution is a serious human rights violation and an intolerable form of child labor," concluding that it "must by definition be deemed involuntary and the aim is its total elimination."¹⁴⁰ The study makes a number of findings regarding the

¹³¹ Wathinee Boonchalaksi & Philip Guest, *Prostitution in Thailand*, in THE SEX SECTOR, *supra* note 3, at 130, 134–35.

¹³² *Id.* at 135; Lim, *supra* note 62, at 208.

¹³³ Lim, *supra* note 3, at 10.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 11.

¹³⁷ *Id.*

¹³⁸ *Id.* at 15.

¹³⁹ THE SEX SECTOR, *supra* note 3, at v.

¹⁴⁰ *Id.*

effects of child prostitution to differentiate between child and adult prostitution. It asserts that the injury suffered by children causes "lifelong and life-threatening consequences,"¹⁴¹ which lead to harms including drug abuse and other health concerns.¹⁴² The study finds that "[m]any adult prostitutes actually enter the sex sector when they are still children" and that continued involvement in the commercial sex sector "tends to compound rather than minimize the trauma and problems they encounter as children."¹⁴³ The findings of the study thus undermine the ILO's attempted distinction between the nature of child and adult prostitution. By finding that trauma continues from childhood into adult prostitution and is in fact exacerbated in adulthood, the study demonstrates that dividing the harms and choices experienced by women from the harms and choices experienced by children and setting a boundary beyond which prostitution is freely chosen is unsupportable.

The report concludes by acknowledging the permanence of the sex sector and the economic and social foundations that support it.¹⁴⁴ As a possible solution, it suggests

that official recognition of the sector . . . would be extremely useful for assessing the health impacts of the activities associated with the sector, for determining the scope and magnitude of labour market policies needed to deal with workers in the sector, and for extending the taxation net to cover many of the lucrative activities connected with it.¹⁴⁵

This approach reveals an almost fatalistic attitude—essentially that prostitution is inevitable and should be tolerated—which is particularly disturbing coming from an agency committed to human rights. The ILO attempts to normalize prostitution as another economic sector in national and international economies. In doing so, however, it again ignores its own study, which offers compelling evidence of the harms of prostitution,¹⁴⁶ the fact that women in prostitution often "[feel] forced"¹⁴⁷ into such work, and the inability of domestic economic and development strategies to ameliorate economic inequalities suffered by women.¹⁴⁸

Although it stops short of endorsing legislation legalizing trafficking for prostitution, the study suggests acceptance of the idea that prostitution can be freely chosen.¹⁴⁹ The ILO, like the Special Rapporteur on Vio-

¹⁴¹ Lim, *supra* note 62, at 212.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 213.

¹⁴⁵ *Id.*

¹⁴⁶ Lim, *supra* note 3, at 17.

¹⁴⁷ *Id.*

¹⁴⁸ Lim, *supra* note 62, at 207.

¹⁴⁹ The study proposes that prostitution be decriminalized, which would include:

lence Against Women,¹⁵⁰ values private choice and the right to consent at the expense of substantive equality. This approach weakens the potential for international mechanisms to effectively address trafficking for sexual exploitation.

3. *The 2001 Protocol*

The definition of trafficking in the 2001 Protocol,¹⁵¹ the most recent international instrument addressing the issue of trafficking for sexual exploitation, reflects the tension between consent and substantive equality in a way that is distinct from the 2000 Special Rapporteur's Report and the 1998 ILO Study. Although the 2001 Protocol makes consent relevant, it expands the range of criminalized activities by broadening the list of coercive behaviors that undermine consent.

The 2001 Protocol provides a sophisticated international definition of trafficking that acknowledges the exercise of power that perpetuates and supports trafficking. It defines trafficking as follows:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs;

(a) reform or review of laws and regulations that sanction, penalize or discriminate against sex workers on the basis of their work; (b) recognition of prostitution as a legal occupation, so that individuals working in the sector have access to the same labor rights and social protection as other workers; (c) special measures to protect the most vulnerable in the sex sector; (d) tightened and stricter enforcement of criminal sanctions against those trafficking in, exploiting or abusing prostitutes; and (e) penal provisions against corrupt enforcement authorities and clients of under-age prostitutes.

Id. at 214–15. It is not entirely clear whether this language would criminalize the behavior of the customer. However, given the ILO's position that adults can freely choose prostitution as work, it would seem to be inconsistent to criminalize the behavior of the customer qua customer without some additional wrongdoing.

¹⁵⁰ 2000 Report of Special Rapporteur, *supra* note 54, ¶ 13, available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

¹⁵¹ 2001 Protocol, *supra* note 64, art. 3(a), available at <http://www1.umn.edu/humanrts/instree/trafficking.html>.

(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in . . . (a) . . . shall be irrelevant where any of the means set forth in . . . (a) have been used¹⁵²

This interpretation emphasizes that trafficking includes not just physically forcible means but also the abuse of power or of a victim's position of vulnerability.¹⁵³ The definition thus does not appear to be limited to those persons who might come within the traditional view of being forced into trafficking. Rather, it embodies a more expansive concept that includes persons targeted because of their particular vulnerabilities. The interpretive notes to the Protocol specify that "reference to the abuse of a position of vulnerability . . . refer[s] to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."¹⁵⁴ Thus, the 2001 Protocol does not require the finding of force or coercion as traditionally defined.

Unlike binding previous instruments, the 2001 Protocol neither considers consent wholly irrelevant nor provides protection for all women in prostitution. Consent is irrelevant only when traffickers use one of the means described in paragraph (a), which include fraud and the abuse of power or vulnerability.¹⁵⁵ This definition of trafficking straddles the issue of choice while attempting to draw the line between coercion and consent. It expands the prohibited purposes for which one may be trafficked, reiterates the 1949 Convention's ban on the exploitation of prostitution, and additionally prohibits other forms of sexual exploitation, forced labor, slavery, servitude, and the removal of organs. The interpretive notes make clear, however, that the language of prohibiting sexual exploitation and exploitation of the prostitution of others is limited to the trafficking context.¹⁵⁶ The interpretive notes specifically state that the 2001 Protocol is "without prejudice" as to how states address prostitution domestically.¹⁵⁷ Thus, the 2001 Protocol seeks to avoid the debate of whether prostitution is necessarily a form of violence or can be freely chosen work.

The 2001 Protocol does, however, require states to take action "to alleviate the factors that make persons, especially women and children,

¹⁵² *Id.* art. 3. The definition also outlaws the recruitment, transportation, transfer, harboring, or receipt of a child for the purpose of exploitation. A child is defined as any person under eighteen years of age. *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Report of the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime on the Work of Its First to Eleventh Sessions*, U.N. GAOR, 55th Sess., Agenda Item 105, ¶ 63, U.N. Doc. A/55/383/Add.1 (2000) [hereinafter *Report of the Ad Hoc Committee*].

¹⁵⁵ 2001 Protocol, *supra* note 64, art. 3(a), available at <http://www1.umn.edu/humanrts/instree/trafficking.html>.

¹⁵⁶ *Report of the Ad Hoc Committee*, *supra* note 154, ¶ 64.

¹⁵⁷ *Id.*

vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity.”¹⁵⁸ This requirement seems to acknowledge the multiple causes of trafficking and the embedded structural inequality that supports it.

4. 2002 Recommended Principles

The 2002 Recommended Principles¹⁵⁹ appear based in part on the 2001 Protocol. Both documents distinguish between the trafficking of children and adults, allowing consent as a defense for trafficking of those over eighteen.¹⁶⁰ Guideline 2 of the Principles asserts that the critical aspect of trafficking, unlike migrant smuggling, is the presence of force, coercion, and/or deception.¹⁶¹ As with the Special Rapporteur’s emphasis on consent, Guideline 2’s language shifts the focus from sexual exploitation and inequality to consent.

C. The Implications of the Changing Role of Consent

Prostitution, “consensual” or not, supports and is supported by social, economic, and political inequalities.¹⁶² To rely on consent to determine if a human rights violation has occurred obscures the systemic subordination and inequality that supports trafficking for sexual exploitation.

The differing views on whether consent should be recognized as a defense to trafficking grow out of the debate as to whether prostitution should be understood as an act of inequality and violative of human rights, or whether “consensual,” “chosen” prostitution furthers self-determination.¹⁶³ These divergent positions on prostitution have marked a division among feminist scholars and activists. On one side are those who view prostitution as work and an expression of women’s sexual autonomy.¹⁶⁴ Such a belief relies on the argument that prohibiting selling sex for money constrains women’s autonomy.¹⁶⁵ On the other side, and the position advo-

¹⁵⁸ 2001 Protocol, *supra* note 64, art. 9, available at <http://www1.umn.edu/humanrts/instree/trafficking.html>.

¹⁵⁹ 2002 Recommended Principles, *supra* note 67, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument).

¹⁶⁰ *Id.* Guideline 8.1.

¹⁶¹ *Id.* Guideline 2.

¹⁶² See Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220 (1999) (arguing that prostitution functions as a paradigm for degeneracy and as a practice of inequality that reinforces social hierarchies).

¹⁶³ See SHEILA JEFFREYS, *THE IDEA OF PROSTITUTION* 306–38 (1997) (describing the debate in the context of international treaties addressing trafficking).

¹⁶⁴ See Holly B. Fechner, *Three Stories of Prostitution in the West: Prostitutes’ Groups, Law and Feminist “Truth,”* 4 COLUM. J. GENDER & L. 26 (1994) (describing efforts to acknowledge prostitution as work); see, e.g., GOOD GIRLS, BAD GIRLS: FEMINISTS AND SEX TRADE WORKERS FACE TO FACE (Laurie Bell ed., 1987); SEX WORK, *supra* note 127; BELL, *supra* note 127; Cornell, *supra* note 127.

¹⁶⁵ See, e.g., BELL, *supra* note 127; SEX WORK, *supra* note 127; WHORES AND OTHER

cated in this Article, is the view that prostitution is inherently a form of violence against women that undermines the goal of gender equality.¹⁶⁶

At the same time that private choice and consent have become increasingly central to determining if a human rights violation has occurred, substantial gender inequality continues worldwide. Women are in subordinate positions with respect to the distribution of economic, educational, political, and social benefits. Of the 1.3 billion people living in poverty, seventy percent are women.¹⁶⁷ While poverty is an overwhelmingly female experience, "in developing countries, more than three-quarters of men's work is in market activities."¹⁶⁸ This imbalance results in men receiving the majority of income and recognition for their economic effort while "most of women's work remains unpaid, unrecognized and undervalued."¹⁶⁹

To label prostitution and sexual exploitation as private choices distinct from the social, economic, and political structures that constrain those choices influences how we address the problem and its possible solutions. If a harmful condition is simply the consequence of a private choice, then persons who make the choice are responsible for their own condition. A private, individual remedy will appear appropriate. A collaborative solution focused on changing unequal societal conditions will seem unnecessary.

IV. THE CONTINUING INVISIBILITY OF THE CUSTOMER

As international documents increasingly focus on the woman's consent to trafficking for prostitution, the male customer's choice to purchase sex remains unexamined. Asking what exactly the customer is buying begins to explore the inequality endemic in trafficking for sexual exploitation. The customer's purchase is an act that both stems from and perpetuates inequality and, therefore, is a violation of human rights.

The hesitancy of the international human rights community to address the customer's role undermines efforts toward gender equality and entrenches the belief that men's economic and social power entitles them to sexual access to women. The provisions addressing demand in recent international documents mark the tentative beginning of an acknowledgment that it is the *demand* for prostitution and commercial sexual services that is a central cause of trafficking for sexual exploitation.

FEMINISTS, *supra* note 127; Cornell, *supra* note 127.

¹⁶⁶ See Fechner, *supra* note 164, at 48; see, e.g., KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979); KATHLEEN BARRY, THE PROSTITUTION OF SEXUALITY: THE GLOBAL EXPLOITATION OF WOMEN (1995); ANDREA DWORKIN, RIGHT-WING WOMEN (1983); JEFFREYS, *supra* note 163; CAROLE PATEMAN, THE SEXUAL CONTRACT (1988).

¹⁶⁷ U.N. DEV. PROGRAMME, HUMAN DEVELOPMENT REPORT 4 (1995).

¹⁶⁸ *Id.* at 6.

¹⁶⁹ *Id.*

A. The Treatment of the Customer in International Human Rights Documents

While early international human rights instruments obligate states to punish third parties who traffic women or girls for immoral purposes,¹⁷⁰ they do not discuss the customer. The 1949 Convention similarly fails to address the demand side of the equation, rendering the customer's role in sex trafficking invisible.¹⁷¹

1. The Special Rapporteur's Reports

The 1983 Report is the only Special Rapporteur's report that explicitly comments on the role of the customer. That report recognizes that the market for prostitution is created by customer demand that is rooted in the customer's belief that women's duty is to serve men's pleasure.¹⁷² It states that a system that solely punishes the prostituted woman "discriminates between men and women, since, at least as far as the Special Rapporteur is aware, it does not punish the client."¹⁷³ Even the 1983 Report does not suggest that the customer be held responsible for his actions, however, if the prostituted woman is not also punished.¹⁷⁴ Consequently, the report still fails to call for true accountability of the customer and his role as part of the system of exploitation.

The 1996, 1997, and 2000 Reports of the Special Rapporteur on Violence Against Women do not address the behavior of the customer. In the 2000 Report, the Special Rapporteur's proposed definition of trafficking centers around "forced labor or slavery-like practices" rather than "more narrowly focusing on prostitution or sexual exploitation."¹⁷⁵ Concentrating the analysis on forced labor calls attention primarily to the third parties responsible for supplying the labor. This framework obscures the role of the customer in sexual exploitation and conceals the structural nature of gender inequalities that perpetuate trafficking.

¹⁷⁰ See, e.g., 1904 Agreement, *supra* note 28, art. 1; International Convention for the Suppression of the White Slave Traffic, *supra* note 31, art. 1; 1933 Convention, *supra* note 35, art. 1, available at <http://www.austlii.edu.au/au/other/dfat/treaties/1936/12.html>.

¹⁷¹ 1949 Convention, *supra* note 37, available at <http://www1.umn.edu/humanrts/instree/traffickingperson.htm>.

¹⁷² 1983 Report, *supra* note 44, at 7.

¹⁷³ *Id.* at 16.

¹⁷⁴ *Id.* at 20 (arguing that "prostitutes should not be punished unless clients are too").

¹⁷⁵ 2000 Report of Special Rapporteur, *supra* note 54, ¶ 17, available at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/\\$FILE/G0011334.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/e29d45a105cd8143802568be0051fcfb/$FILE/G0011334.pdf).

2. *The ILO Study*

Consistent with its analysis of the sex sector as an entrenched element of the economy and prostitution as freely chosen work, the 1998 ILO study does not call for sanctions against customers. It only suggests increased penalties for third-party traffickers and those who abuse women in prostitution.¹⁷⁶ Based on its different position on child prostitution, the ILO study does urge enforcement of sanctions against clients of children.¹⁷⁷

3. *The 2001 Protocol*

The 2001 Protocol makes the first references in a binding international document to the demand side of sex trafficking. The 2001 Protocol requires state parties to "adopt or strengthen legislative or other measures, such as educational, social or cultural measures . . . to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking."¹⁷⁸ Arguably this language requires states to focus on the persons who create the demand for trafficked women, including customers.

4. *2002 Recommended Principles*

The more recent 2002 Recommended Principles also addresses the role of the customer, but again with only a few broad-based references.¹⁷⁹ While there are specific guidelines for the protection of the trafficked person¹⁸⁰ and for the identification¹⁸¹ and prosecution of the trafficker,¹⁸² there are no explicit guidelines addressing the customer's behavior and the corresponding responsibilities of states to punish customers.

Interestingly, the one area where the Recommended Principles seems to go beyond previous U.N. documents is its treatment of diplomatic and

¹⁷⁶ Lim, *supra* note 62, at 214–15.

¹⁷⁷ *Id.* at 215.

¹⁷⁸ 2001 Protocol, *supra* note 64, art. 9, available at <http://www1.umn.edu/humanrts/instreet/trafficking.html>.

¹⁷⁹ The 2002 Recommended Principles suggests that "[s]trategies aimed at preventing trafficking shall address demand as a root cause of trafficking." 2002 *Recommended Principles*, *supra* note 67, Guideline 7, available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument). Guideline 5 asserts that "[m]ore effective law enforcement will create a disincentive for traffickers and will therefore have a direct impact upon demand." Guideline 7 goes on to propose that states, in cooperation with non-governmental and inter-governmental organizations, analyze the factors that generate demand for "exploitative commercial sexual services and exploitative labour . . . taking strong legislative, policy and other measures to address these issues." *Id.* Guideline 7.1.

¹⁸⁰ *See id.* Guideline 6.

¹⁸¹ *See id.* Guideline 2.

¹⁸² *See id.* Guideline 5.

peacekeeping personnel. The Recommended Principles encourage states and inter- and non-governmental organizations to ensure that “staff employed in the context of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic missions do not engage in trafficking and related exploitation or use the services of persons in relation to which there are reasonable grounds to suspect they may have been trafficked.”¹⁸³ States must ensure that appropriate sanctions are imposed upon those personnel who “have engaged in or been complicit in trafficking and related exploitation.”¹⁸⁴ The Recommended Principles defines related exploitation as including “the exploitation of the prostitution of others or other forms of sexual exploitation”¹⁸⁵ Thus, even though this document does not confront the behavior of customers on a broad basis, the High Commissioner does assert a special concern with respect to the behavior of diplomatic and military personnel. Consequently, the Recommended Principles makes some measure of progress toward recognizing the responsibility of the customer.

B. What Is the Customer Buying?

Although international documents have increasingly considered the choice and consent of women to engage in trafficking for sexual exploitation, they have failed to examine the choice of customers to buy sex from trafficked women. Research studies of customers who purchase sex, notwithstanding that the studies do not distinguish between women who were and were not trafficked, make plain that men are paying to exercise power over a woman for sexual use and domination.

One researcher, commenting on a series of interviews with men who patronized a massage parlor in New Zealand, noted that the customers believed that commercial sex was a mutually pleasurable exchange, while at the same time asserting that payment of money removed all social and

¹⁸³ *Id.* Guideline 10.3.

¹⁸⁴ *Id.* Guideline 10.7. Indeed, the involvement of U.N. forces in the sex trade has garnered international media attention. See, e.g., Isabelle Talleyrand, *Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women*, 27 SYRACUSE J. INT’L L. & COM. 151, 157–58 (2002) (arguing that there is ample evidence of the use of women in prostitution by U.N. troops and that women involved in military prostitution tend to be victims of international trafficking); Donatella Lorch, *U.N.-Rwanda Ties Sour as Mandate Nears End*, N.Y. TIMES, May 21, 1995, at A8 (citing senior U.N. military officials who concede that prostitution has increased in towns in Rwanda where troops are stationed); Stanley Meisler, *Prostitution Report Accuses UN Troops in Mozambique*, L.A. TIMES, Feb. 26, 1994, at A11 (explaining that a report released by the deputy chief of the U.N. Mission in Mozambique accused U.N. peacekeeping troops in Mozambique of encouraging prostitution); *U.N. Focuses on Peacekeepers Involved in Child Prostitution*, N.Y. TIMES, Dec. 9, 1996, at A9 (reporting that then Secretary-General Boutros Boutros-Ghali “ordered an investigation into how many United Nations peacekeepers in conflicts abroad may have hired child prostitutes”).

¹⁸⁵ 2002 *Recommended Principles*, *supra* note 67, at n.1, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.2002.68.Add.1.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.2002.68.Add.1.En?Opendocument).

ethical obligations.¹⁸⁶ It appears that customers first normalize their choices by contending that there is a mutuality to the exchange and thus it is not an act that exploits inequality.¹⁸⁷ However, customers simultaneously consider mutuality inconsequential because payment absolves the customer of any responsibility.¹⁸⁸

In a study of prostitution in Scotland, researchers reported that the men "repeatedly stressed the attraction of a woman whom one could ask to do anything."¹⁸⁹ The researchers concluded that for most men they interviewed, "the prostitute seemed to be no more than the sex she sold."¹⁹⁰ They quoted one man admitting that "you've got a bit more dominance, you've got the money in your pocket, then you've got the dominance over them."¹⁹¹ A study investigating Norwegian customers' views of what they wanted in purchasing sex found a similar desire for domination.¹⁹² The study's authors noted that "[a]vailability is fundamental for all prostitution. Women can be bought, that's what it's all about. All customers make use of this . . . because they . . . have a unique attraction to prostitutes as an embodiment of availability."¹⁹³ The creation and maintenance of a pool of women available for purchase for sexual use supports and is supported by the existing structural inequalities embedded in these power relations between prostituted women and their customers, as well as those between prostituted women and their traffickers and prostituted women and the state.¹⁹⁴

The customer's own description of what he is buying suggests that his relationship to a prostituted woman is fundamentally different from the one between a customer and other personal service providers, such as

¹⁸⁶ Elizabeth W. Plumridge et al., *Discourses of Emotionality in Commercial Sex: The Missing Client Voice*, 7 FEMINISM & PSYCHOL. 165, 171 (1997).

¹⁸⁷ O'Connell Davidson observes:

Prostitution . . . is most usually organized as if it involved a mutual and voluntary exchange, and the various formalities which surround the prostitute-client transaction . . . make it possible for the client to read his sexual contract with the prostitute as consensual. Even where the client has negotiated with and made payment to a third party, rather than to the prostitute, he can tell himself that the woman concerned has agreed to work this way.

O'CONNELL DAVIDSON, *supra* note 130, at 121.

¹⁸⁸ Another researcher, noting that the most vulnerable women seemed to be the most successful in attracting clients, remarked that "[w]omen who appear entirely powerless and incapable of setting the boundaries of the sexual activity to take place will attract men who may wish to legitimize an act of sexual abuse by the payment of cash." Clive L. Morrison et al., *Alcohol and Drug Misuse in Prostitutes*, 90 ADDICTION 292 (1995).

¹⁸⁹ NEIL MCKEGANEY & MARINA BARNARD, SEX WORK ON THE STREETS: PROSTITUTES AND THEIR CLIENTS 53 (1996).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² CECILIE HØIGÅRD & LIV FINSTAND, BACKSTREETS: PROSTITUTION, MONEY, AND LOVE 97, 104-05 (Katherine Hanson et al. trans., 1992).

¹⁹³ *Id.* at 97.

¹⁹⁴ See O'CONNELL DAVIDSON, *supra* note 130, at 193.

legitimate masseuses or food servers.¹⁹⁵ While it is certainly possible for providers of other personal services to be in exploitative work environments, there is nothing inherently invasive or inevitably sexually objectifying in those services. Sexuality and bodily integrity are significantly implicated in prostitution, however. Rather than objects to be bargained for, sexuality and bodily integrity are attributes “which [are] integral to the person.”¹⁹⁶ To commodify those attributes does harm to the concept of personhood and what it means to be human. The invasion of bodily integrity and the objectification of sexuality that occur in trafficking for sexual exploitation cause the customer to view the prostituted woman as “no more than the sex she sold” and less than human¹⁹⁷ in a way that providers of other forms of “personal service” are not.

¹⁹⁵ PATEMAN, *supra* note 166, at 207 (noting that the “sale of women’s bodies in the capitalist market involves sale of a self in a different manner, and in a more profound sense, than sale of the body of a male baseball player or sale of command over the use of the labour (body) of a wage slave”).

¹⁹⁶ MARGARET JANE RADIN, *CONTESTED COMMODITIES* 88 (1996). Radin recognizes that “[i]f the social regime permits buying and selling of sexual and reproductive activities, thereby treating them as fungible market commodities given the current understandings of monetary exchange, there is a threat to the personhood of women, who are the ‘owners’ of these ‘commodities.’” *Id.* at 127. Interestingly, Radin concludes that even if commodification denies the uniqueness of the person, prohibiting it denies women a market for their sexual services, and, given the “feminization of poverty and lack of avenues for free choice for women, this prohibition also poses a threat to the personhood of women.” *Id.* Radin contends:

[I]f we ban these exchanges without changing the circumstances that led to their seeming desirable to the would-be sellers, we seem to deny freedom of choice to those who are already harmed in their freedom of choice by racism and sexism. At the same time we seem to close an avenue through which poor people would gain wealth when we prevent monetization of something that “belongs” to them.

Id. at 159. In light of what she considers a “double bind,” Radin proposes as the best policy solution to the problem of prostitution “a regime of regulation expressing incomplete commodification” with decriminalization of the sale of sexual services while banning pimping and recruitment. *Id.* at 134–35.

¹⁹⁷ O’Connell Davidson describes the power relations between women and clients within each transaction:

As a client, the social constraints on sexual interaction are removed because the prostitute, who is symbolically excluded from the sexual community, does not have to be acknowledged as a full human subject. All obligations are discharged through the simple act of payment in cash or kind.

The corollary of this is that the prostitute is constructed as an object, not a subject, within the exchange. No matter how much control the prostitute exercises over the details of each exchange, the essence of the transaction is that the client pays the prostitute to be a person who is not a person. Clients thus get to have sex with a real live, flesh and blood human being, and yet to evade all of the obligations, dependencies and responsibilities which are implied by sexual “fusion” in non-commercial contexts. They get to have sex with a person who is physically alive but socially dead.

O’CONNELL DAVIDSON, *supra* note 130, at 133–34.

Traffickers, brothel owners, and customers trade women and girls as commodities because of their greater economic and social power.¹⁹⁸ If attention is focused on the woman's consent, this embedded inequality becomes obscured. The veneer of consent conceals the exercise of the customer's power free of responsibility and reinforces the already existing economic and social hierarchies. The exercise of power by the dominant group thus becomes the "choice" of the subordinated group. As Catharine MacKinnon observes, "If prostitution is a free choice, why are the women with the fewest choices the ones most often found doing it?"¹⁹⁹

When U.N. and other international documents fail to hold the customer accountable for his choices in purported furtherance of women's autonomy, they are, in fact, protecting the exercise of dominant power. The payment of money normalizes and legitimizes the transaction and acceptance of the payment is transformed into consent to sexual exploitation. By attributing choice and consent to the prostituted woman, her right to equality and justice is denied. Recognizing that the customer's choice to exercise power is what is actually protected in international instruments is the first step to examining the roots of privileging choice and consent over equality.

V. PRIVATE CHOICE AND INEQUALITY

Historically, there has been a distinction drawn "between the 'public' sphere of political and commercial life and the 'private' sphere of intimate association."²⁰⁰ A cornerstone of liberal theory has been its delineation of a private zone of individual autonomy free from state interference.²⁰¹ If the site of much of the behavior that constrains and abuses women is deemed private and therefore not appropriate for intervention by the state or regulation by international law, gender subordination remains unchallenged.²⁰² Thus, the public/private dichotomy provides a means for maintaining the subordinate position of women.²⁰³

More specifically, in the area of international human rights, limited governmental intervention, by ignoring structural inequality, reinforces

¹⁹⁸ See Chris Cunneen & Julie Stubbs, *Male Violence, Male Fantasy and the Commodification of Women Through the Internet*, 7 INT'L REV. VICTIMOLOGY 5, 8 (2000).

¹⁹⁹ Catharine A. MacKinnon, *Prostitution and Civil Rights*, 1 MICH. J. GENDER & LAW 13, 28 (1993).

²⁰⁰ DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 125 (1989).

²⁰¹ Richard F. Galvin, *Moral Pluralism, Disintegration, and Liberalism*, in THE LIBERALISM-COMMUNITARIANISM DEBATE 39, 47 (C. F. Delaney ed., 1994) ("One hallmark of a liberal society is the stipulation that there are spheres of conduct that lie beyond the limits of legitimate government interference . . .").

²⁰² See RHODE, *supra* note 200, at 237-40 (arguing that domestic violence in the United States historically was considered part of the private sphere and thus not subject to legal remedy).

²⁰³ See *id.* at 126.

the status quo of gender subordination.²⁰⁴ Liberty and autonomy are equated with freedom from state interference; thus the state appears neutral in its noninterference. However, such a stance fails to confront embedded institutional structures that support and maintain gender subordination.²⁰⁵ This protection of individual liberty assumes that choices are made outside the relations of power within which individuals operate and are unconnected to institutional structures of inequality.²⁰⁶

At first glance, privileging choice and autonomy may appear to benefit all people. However, inequality is revealed in the answers to the following questions: Who gains by characterizing prostitution as a choice? Who benefits from labeling some prostitution acceptable under international human rights norms? Who is advantaged by a distinction between “chosen” prostitution as a private exercise of autonomy and “forced” prostitution as an action to be condemned? Those in a position to exercise power and those who have more to protect are the beneficiaries of a model of privacy and nonintervention. In addressing the public/private distinction in the context of state action and the U.S. Constitution, Frances Olsen argues:

Privacy is most enjoyed by those with power. To the powerless, the private realm is frequently a sphere not of freedom but of uncertainty and insecurity. . . . [T]he standard situation in which one enjoys privacy and freedom is not a situation of equality but one of hierarchy. We virtually never all enjoy privacy equally, and the pretense that equality is the norm, and situations of domination an exception, is simply another way of maintaining the status quo.²⁰⁷

Discrimination practiced by the dominant group to maintain the status quo of inequality becomes the expression of natural choice and thus invisible.

Legal scholar Dorothy Roberts provides an effective analogy. She explains the prioritization of individual liberty over equality—the “priority paradigm”—in a racial context through her analysis of the U.S. Supreme Court decision *City of Memphis v. Greene*.²⁰⁸ In *Greene*, the city closed a street between an all-white neighborhood and a predominately black

²⁰⁴ See Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in HUMAN RIGHTS OF WOMEN, *supra* note 26, at 91–93.

²⁰⁵ See Dorothy E. Roberts, *The Priority Paradigm: Private Choices and the Limits of Equality*, 57 U. PITT. L. REV. 363, 370 (1996) (arguing that the liberal tradition of limited government intervention to “protect[] citizens against imposition of state orthodoxy . . . means that the definition of liberty must set aside certain claims to substantive equality”).

²⁰⁶ *Id.* at 374–75.

²⁰⁷ Frances Olsen, *Constitutional Law: Feminist Critiques of the Public/Private Distinction*, 10 CONST. COMMENT. 319, 325–26 (1993).

²⁰⁸ Roberts, *supra* note 205, at 379; *Memphis v. Greene*, 451 U.S. 100 (1981).

area, which prevented black motorists from traveling through the white neighborhood.²⁰⁹ Black citizens challenged the action as a violation of equal protection and the Thirteenth Amendment.²¹⁰ The Court upheld the city's decision, finding that it neither discriminated against nor imposed a stigma on black citizens. Rather, the Court found closing the street to be simply the exercise of private preference and a choice to maintain the residential neighborhood.²¹¹ The Court went on to find that even if the barrier had a differential impact, it was simply the result of where people happened to live and drive as opposed to a function of race.²¹² The city's policy decision to give effect to private interests over claims of equality protected the liberty interests of the white homeowners at the expense of the rights of black citizens. As Roberts observes: "In the Court's view, the black citizens' equality demands showed . . . their refusal to respect the liberty rights of property owners . . . [and transformed] this imposition of power into protectable private interests."²¹³

Admittedly, the issue of prostitution is not an exact parallel to the racial context described by Roberts. In prostitution, when the customer is exercising private choice, choice also is attributed to the prostituted woman. In *Greene*, black citizens were challenging, rather than consenting to, the imposition of a barrier in their neighborhood. The privileging of private choice in both the racial and trafficking contexts, however, operates in a similar fashion. In *Greene*, the private choice of the white residents obscured their exercise of power. It maintained the status quo of racial hierarchy by protecting white private interests and marginalizing black claims for equality. In the context of trafficking for purposes of prostitution, the attribution of choice to the woman in prostitution obscures the customer's exercise of power, leaving him unaccountable for his choices. It maintains gender hierarchy by ignoring the inequalities that make mutuality unlikely if not unattainable. In both the racial and gender contexts, the exercise of power is obscured by choice.

As previously discussed, the consent debate flows from the argument over whether prostitution is an act of inequality or an expression of sexual autonomy. The autonomy argument, however, seems to be absent in other, nongendered contexts. For example, federal law prohibits the purchase of any human organ for transplant purposes.²¹⁴ Commentators do not express concern that outlawing the commodification of organs constrains the autonomy of (both male and female) potential sellers. While some scholars suggest a form of compensation as a possible solution to the problem of organ shortage, they are addressing the issue of limited sup-

²⁰⁹ Roberts, *supra* note 205, at 379.

²¹⁰ *Id.* at 379-80.

²¹¹ *Id.* at 379-81.

²¹² *Id.* at 380.

²¹³ *Id.*

²¹⁴ S. REP. NO. 98-382, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 3975, 3976.

ply instead of the limited autonomy of the potential seller.²¹⁵ Thus, the argument that prohibiting the sale of sex for money is a limitation on women's autonomy is a gendered one. Just as in *Greene*, in which the private choice of white residents masked racial inequality, the private choice of the customer masks structural gender inequality.

VI. CONCLUSION

The evolution of language in human rights documents has increasingly made the choice or consent of the trafficked woman the linchpin to determine if a human rights violation has occurred. International instruments currently fail to confront the systemic inequality that supports trafficking for sexual exploitation and undermines the values of justice and equality. Following the cautious first steps taken in recent documents in recognizing the role of customer demand in sustaining trafficking for sexual exploitation, it is now time for the international community to commit resources to address the underlying inequalities that fuel trafficking of women and to hold customers accountable for their role in creating and maintaining sex trafficking.

Recommendation 19, issued by the CEDAW Committee, makes clear that CEDAW applies not just to state actors but to all persons or organizations that discriminate.²¹⁶ It stresses that under general international law and human rights covenants, states may be "responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence."²¹⁷ The recognition of individual responsibility for human rights violations and states' obligations for failing to end such behavior imposes a responsibility to enforce anti-trafficking measures against individual citizens and organizations.

The next critical step in the international arena is the adoption of instruments that include provisions to address directly the role of the customer and the demand for sexual exploitation of trafficked women. In addition to a commitment to meet treaty obligations through domestic action, states should be encouraged to enact civil and criminal sanctions to hold customers accountable for their behavior. One form of redress for trafficked women could be states' adoption of legislation creating a civil

²¹⁵ See, e.g., Shelby E. Robinson, *Organs for Sale? An Analysis of Proposed Systems for Compensating Organ Providers*, 70 U. COLO. L. REV. 1019, 1037 (1999); Andrew C. MacDonald, *Organ Donation: The Time Has Come to Refocus the Ethical Spotlight*, 8 STAN. L. & POL'Y REV. 177, 182 (1997). But see RADIN, *supra* note 196, at 52 (arguing that a double bind exists because allowing the sale of things important to personhood, such as organs, is harmful and disempowering, while preventing the sale of such things disadvantages poor people).

²¹⁶ Recommendation 19, *supra* note 95, ¶ 9, available at <http://www1.umn.edu/humanrts/gencomm/generr19.htm>.

²¹⁷ *Id.*

remedy for the harms caused by sexual exploitation.²¹⁸ This remedy could empower trafficked women to obtain compensation from their traffickers and the customers who made the choice to exploit them.

States must also negotiate bilateral and regional agreements to address the issue of trafficking for sexual exploitation and, specifically, demand by the customer. One example of such an effort is the January 2002 passage of the South Asian Association for Regional Cooperation's ("SAARC") Convention on Preventing and Combating Trafficking in Women and Children for Prostitution.²¹⁹ Although the SAARC Convention does not specifically address the issue of customer demand, it does define trafficking to mean "the moving, selling or *buying* of women and children for prostitution within and outside a country for monetary or other considerations *with or without the consent* of the person subjected to trafficking"²²⁰

The language of international human rights documents and the positions they reflect have been influential in bringing women's human rights to the foreground in the global community. These instruments set norms and standards that educate and foster a culture for advancing women's human rights;²²¹ equality and nondiscrimination ought to be central to those norms. The changing nature of the language critiqued here illustrates that the concept of human rights is dynamic and that a focus on real equality

²¹⁸ See, e.g., MINN. STAT. § 611A.81–88 (2003); FLA. STAT. ch. 796.09 (2003) (outlining civil causes of action for coercing individuals into prostitution). Minnesota additionally specifically prohibits consent to be prostituted as a defense. MINN. STAT. § 611A.82.

²¹⁹ The South Asian Association for Regional Cooperation ("SAARC") Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Jan. 5, 2002, available at <http://www.saarc-sec.org/publication/conv-trafficking.pdf> (last visited Feb. 1, 2004).

²²⁰ *Id.* art. 1 (emphasis added).

²²¹ The presumption that international law makes a difference is basic to the work of many legal scholars and activists. There have been few systematic studies, however, to test this presumption. The question of whether countries comply with human rights treaties is explored in a recent article that engaged in a quantitative analysis of the "relationship between human rights treaties and countries' human rights practices." See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 935, 939 (2002). Hathaway finds that "although countries that ratify treaties usually have better ratings than those that do not, noncompliance appears common." *Id.* at 1999. Moreover, in examining whether treaty requirements are effective in changing human rights practices, Hathaway concludes that "not only is treaty ratification not associated with better human rights practices than otherwise expected, but it is often associated with worse practices." *Id.* at 1989.

The findings, however, do not necessarily support the conclusion that human rights treaties do not positively influence norms of behavior. As Hathaway observes:

[T]reaties may have broader positive effects not captured by the analysis. . . . [H]uman rights treaties and the process that surrounds their creation and maintenance may have a widespread effect on the practices of *all* nations by changing the discourse about and expectations regarding those rights [W]hen a treaty gains a sufficient following, it is generally viewed as expressing what conduct is and is not acceptable to the community of nations. The treaty can thus influence individual countries' perceptions of what constitutes acceptable behavior.

Id. at 202 (emphasis added).

is possible. The dynamic quality of human rights means that recognized rights can be interpreted in new ways to promote equality for women.²²² Even if current instruments have proven inadequate to address embedded gender discrimination, the potential remains to advance the goals of justice and equality.

²²² As shown by the adoption of CEDAW and the Declaration on the Elimination of Violence Against Women, concerns about women's equality can influence international human rights standards. See CEDAW, *supra* note 22, available at <http://www1.umn.edu/humanrts/instreetree/e1cedaw.htm>; Declaration on the Elimination of Violence Against Women, *supra* note 24, available at <http://www1.umn.edu/humanrts/instreetree/e4devw.htm>.

